

**UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 16**

Houston, Texas

CONSERVATEK INDUSTRIES, INC. ¹

Employer

and

Case No. 16-RC-10579

**INTERNATIONAL BROTHERHOOD OF
TEAMSTERS LOCAL UNION NO. 988**

Petitioner

DECISION AND DIRECTION OF ELECTION

I. The Petition, Issue Presented, and Parties' Positions

The Petitioner initially sought to represent all welders, brake press operators, drill press operators, press operators, saw operators, shear operators, machinists, shipping clerks, material handlers, crating and packing, and maintenance personnel at the Employer's Conroe facility and to exclude all other employees, field representatives, guards, watchmen, and supervisors as defined in the Act. At hearing, the Petitioner amended the petition and now seeks to represent all operators, operator welders, maintenance mechanics, material handlers, shipping clerks, acting assistants, acting lead shipping clerks, and lead operators at the Employer's Conroe facility and to exclude all other employees, guards, watchmen, and supervisors as defined in the Act. The Employer contends that the lead operators are supervisors within the meaning of Section 2(11) of

¹ The Employer's name appears as amended at the hearing.

the Act and, as such, should be excluded from the unit. Thus, the only issue at hand is whether the lead operators are supervisors within the meaning of Section 2(11) of the Act.

Both parties stipulate that the following classifications/employees are supervisors who possess and exercise at least one of the 2(11) indicia and, therefore, should not be included in any unit found appropriate: President and Chief Executive Officer Donald Brown, Chief Operating Officer Alfonso Lopez, Fabrication Manager Rick Bradfute, Production Supervisor Mark Degitz, Production Control Supervisor Johnny Adams, and the TBN shipping supervisor position, which is currently vacant. Additionally, both parties stipulate that no collective bargaining agreement covers any of the employees in the unit sought and that no contract bar exists. Finally, the Petitioner agrees to represent employees in any unit found appropriate.

II. The Regional Director's Findings

I have considered the evidence adduced during the hearing and the arguments advanced by both parties. For the reasons set forth below, I find that the lead operators are supervisors within the meaning of Section 2(11) of the Act and, therefore, are excluded from the unit. Accordingly, I will direct an election in a unit consisting of approximately 28 employees.

To lend a context to my discussion of the issues, I will first provide an overview of the Employer's operations and supervisory structure. Then, I will discuss the evidence regarding supervisory status and the reasoning that supports my findings.

III. Overview of Employer's Operations and Supervisory Structure

The Employer designs, fabricates, and installs aluminum roofing structures. In doing so, it supplies to several markets. For example, the Employer serves municipalities for water reservoirs, the chemical control industry for storage tanks, and corporations for various architectural applications. The fabrication shop, at issue here, is located in Conroe.

Within the fabrication shop, Degitz, Adams, and the TBN Shipping Supervisor report to Bradfute. Degitz oversees lead operators, welders, operators, maintenance mechanics, and material handlers. Adams oversees production control clerks and N/C programmers. The TBN shipping supervisor oversees shipping coordinators, lead shipping clerks, and shipping clerks.

IV. Disputed Classification: Lead Operator

A. Background

In general, lead operators are responsible for the operation and setup of fabrication equipment, and they assume a supervisory role in their assigned areas. Lead operators, as supervisors, possess and exercise the authority to discipline the operators that they oversee. This discipline may come in the form of a written warning or by reassigning poorly performing operators to non-production tasks. At hearing, the Employer entered eight different written warnings, administered by lead operators, into evidence. The written warnings are composed independently from any instruction from upper management and are based on the lead operators' observation or knowledge of the disciplinary problem. The warning form contains an area where the lead operator states what disciplinary consequences should be taken if the incident occurs again.

Lead operators also undertake such tasks as assigning work to operators, overseeing the operation and setup of machinery and equipment, inspecting finished parts, training operators, ensuring compliance with safety rules, ensuring proper completion of required shop order documentation, providing input for performance reviews, maintaining clean workstations, and opening/closing the facility using keys and alarm codes that they have special access to. In addition to these primary responsibilities, the lead operator position entails other duties. Some of these duties include attending regular supervisory meetings, answering phone calls from

operators who call into work sick in the morning and approving/noting these absences, and excusing operators from work if they need to leave early.

Lead operators must have at least five years experience in a fabrication facility, must be able to proficiently perform all operator position responsibilities, must be able to meet all operator position requirements, and must be able to organize and setup workstations in their assigned areas.

Currently, the Employer employs three lead operators: Hector Barrera, Ricardo Barrera, and Ray Krenkle. Each lead operator is responsible for between six and fifteen operators, depending on the shift. The lead operators, in turn, report to Degitz and Bradfute. Although all lead operators work the day shift and enjoy the same benefits, their hourly wages (which are higher than those of the operators) vary and are determined by experience. The record is not clear as to the exact wages of lead operators, however it does reflect that the most inexperienced operator, Hector Barrera, received a one-dollar per hour raise when he promoted from operator to lead operator.

B. Analysis

The Employer asserts that the three lead operators are supervisors and should be excluded from the bargaining unit. “Supervisor” is defined in Section 2(11) of the Act to mean any individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use independent judgment. The burden of proving supervisory status rests squarely on the party asserting that claim. *Bennett Industries*, 313 NLRB 1363 (1994). For the reasons

set forth below, I find that the Employer has met its burden and that the lead operators should be excluded from the unit.

Possession of just one of the 2(11) indicia is sufficient to confer supervisory status. *Baby Watson Cheesecake*, 320 NLRB 779 (1986). Additionally, where “the possession of any one of the aforementioned powers is not conclusively established, or ‘[i]n borderline cases,’ the Board looks to well-established secondary indicia, including the individual’s job title or designation as a supervisor, attendance at supervisory meetings, job responsibility, authority to grant time off, etc., whether the individual possesses a status separate and apart from that of rank-and-file employees.” *See id.* at 784 (citing *NLRB v. Chicago Metallic Corp.*, 794 F.2d 527, 531 (9th Cir. 1986)). An employee is a statutory supervisor if he or she has (1) the authority to engage in any of the supervisory functions, (2) his or her exercise of supervisory authority “is not of a merely routine or clerical nature, but requires the use of independent judgment,” and (3) the authority is held in the interest of management. *NLRB v. Kentucky River Comm. Care, Inc.*, 532 U.S. 706, 713 (2001) (citing *NLRB v. Health Care & Retirement Corp. of America*, 511 U.S. 571, 573-74 (1994)).

In the instant case, the record reflects that the lead operators possess several of the primary supervisory indicia. First, lead operators frequently discipline operators without giving prior notice to upper management. This discipline may come in the form of a written warning, which cites a description of the infraction and the action that the lead operator believes needs to be taken (including suspension and termination), and contains a space for the employee and supervisor to sign off. Indeed, in *Venture Industries, Inc.*, 327 NLRB 918, the Board held that line and department supervisors who had the authority to issue oral or written reprimands and who could recommend that an employee be suspended pursuant to the progressive discipline

system possessed supervisory authority to “discipline employees.” In the instant case, the lead operators may also discipline by reassigning poorly performing operators from the fabrication floor to a non-production task such as sweeping. This type of discipline was found to be indicative of supervisory status in *Iron Mountain Forge Corp.*, 278 NLRB 255, where the Board adopted the judge’s finding that “spontaneous on-the-spot oral warnings to employees who persist in poor performance” displayed supervisory authority.

Second, lead operators assign work to operators and continuously direct that work throughout the workday. In this capacity, lead operators receive shop orders and, armed only with the dates that the orders need to be shipped, prioritize, staff, and schedule the work accordingly. Lead operators determine which operators should be assigned a particular order, the order that the jobs are to be completed in, and the machine to be used for each job. Further, lead operators train and direct operators as to how to complete their tasks and are readily available to answer questions and review their work. Similarly, in *Gen Pro, Inc.*, 110 NLRB 12 (1954), the Board held that lead operators who were responsible for assigning jobs, instructing, and directing the work of employees were supervisors.

Third, lead operators have the authority to inspect the operators’ products and reassign repair work. To begin with, all products manufactured by the operators must pass the inspection of the lead operators. The Board, in this regard, has held that inspecting product quality necessitates the use of independent judgment and bestows supervisory status. The facts in this case resemble those in *Iron Mountain Forge Corp.*, 278 NLRB 255, where leadmen who were charged with the duty of assuring that the product met the employer’s standards were found to be supervisors. If the product does not pass inspection, lead operators may require the operator(s) responsible to repair the product or they may assign the repairs to another operator. This

decision is based upon lead operators' assessment of the operators' skill and workload. Responsibility of this nature, involving reassigning and delegating, also requires the use of independent judgment and therefore the exercise of supervisory power. *Polynesian Hospitality Tours*, 297 NLRB 228 (1984).

In addition to the three primary indicia discussed above, the record reflects numerous examples of secondary indicia. Lead operators are paid more than operators; lead operators attend supervisor meetings with Degitz and Bradfute three to five days per week; lead operators conduct oral evaluations of the operators' performance (and are sometimes asked to put their comments in writing); lead operators enjoy special privileges that operators do not, such as being entrusted with the keys and alarm codes necessary to open and close the facility; lead operators are regarded by their subordinates as supervisors, as evidenced by the fact that operators regularly contact and are excused by lead operators if they need to leave work early; and, if lead operators were not considered supervisors, two people would be responsible for supervising between 31 and 45 employees – a disproportionate supervisor-employee ratio. It is well settled that the Board looks to secondary evidence of supervisory authority, such as those just mentioned, to support its findings. *Baby Watson Cheesecake*, 320 NLRB 779 (1986).

The case law cited in support of the Petitioner's contention that lead operators are not supervisors is distinguishable from the case at hand. For instance, the Petitioner cites *St. Francis Medical Center-West*, 323 NLRB No. 185, to argue that lead operators do not possess supervisory authority because their exercise of disciplinary authority, as in *St. Francis Medical Center-West*, is sporadic and only taken in the absence of a superior. However, the record is replete with evidence that this is not the case here. The Employer entered eight different written warning notices into evidence. Lead operators completed these warnings independently and did

not need to consult with a superior before doing so; the action was taken on their own volition. The record, moreover, reflects that lead operators are authorized to issue warning notices whenever they feel that a disciplinary violation has occurred, regardless of whether a superior is present. In fact, although Degitz may have been absent when the warning notices in evidence were issued, Bradfute was not.

Further, a general argument proffered by the Petitioner, that lead operators merely utilize past experience and skill in their capacity and do not exercise independent judgment, is misplaced. When lead operators are given an order, for example, they are told only when that order is due. All other decisions, such as staffing the work accordingly and directing the operators' work, require that the lead operators use independent judgment in determining how best to meet the order deadline. Nevertheless, experience and skill are necessary qualifications for a supervisory position, and it is improper to completely discard them in an analysis.

V. Summary

In view of the pertinent Board law and the evidence reflected in the record, I find that the evidence regarding the supervisory status of lead operators compels their exclusion from the unit. As described above, my decision is based on the fact that lead operators possess and exercise the authority to discipline, assign and direct work, and inspect and reassign repair work. They are also paid more than operators, are perceived by operators as supervisors, attend supervisor meetings, conduct evaluations, enjoy special privileges, and, if they were not considered supervisors, the supervisor-employee ratio would be disproportionate. In sum, the Employer has met its burden in demonstrating that the lead operators are 2(11) supervisors, and accordingly, I find that they should be excluded from the unit.

VI. Conclusions and Findings

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.
2. The parties stipulated, and I find, that the Employer is a Texas corporation with an office and place of business in Conroe, Texas where it is engaged in the fabrication of domes. In the past twelve months, a representative period, it has sold and shipped from its Conroe, Texas facility products valued in excess of \$50,000 directly to points located outside the State of Texas. Based on the foregoing, I find that the Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.
3. The Petitioner claims to represent certain employees of the Employer.
4. The parties stipulated to the Petitioner's status as a labor organization.
5. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
6. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

INCLUDED: All operators, operator welders, maintenance mechanics, material handlers, shipping clerks, acting assistants, and acting lead shipping clerks employed by the Employer in Conroe, Texas.

EXCLUDED: All other employees, lead operators, guards, watchmen, and supervisors as defined in the Act.

VII. Direction of Election

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by the International Brotherhood of Teamsters Local Union No. 988.

The date, time, and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

A. Voting Eligibility

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

B. Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Resident Office, 1919 Smith Street, Suite 1545, Houston, Texas 77002, on or before May 18, 2004. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at 713-209-4890. Since the list will be made available to all parties to the election, please furnish a total of **two** copies, unless the list is submitted by facsimile, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

C. Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. ***Club Demonstration Services***, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

VIII. Right to Request Review

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5:00 p.m., EST, on May 25, 2004. The request may not be filed by facsimile.

Dated May 11, 2004, at Fort Worth, Texas.

/s/ Curtis A. Wells

Curtis A. Wells, Regional Director
NLRB Region 16